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No. 717

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

DERBY FOODS, INC., PETITIONER

v.

FOOD AND DRUG ADMINISTRATION, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 25a-34a) is reported at 427 F.2d 511.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1970. A petition for rehearing was denied on June 22, 1970. The petition for a writ of certiorari was filed on September 18, 1970. The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in a rule-making proceeding to establish a definition and standard of identity for a food product, the Commissioner of Food and Drugs, after making detailed findings of fact to support his order, was required to give specific reasons why some existing product formulations were excluded from the definition.

STATUTES INVOLVED

The pertinent statutes, 5 U.S.C. 557 (c)(A), 21 U.S.C. 341, and 21 U.S.C. 371(e)(3) and (f)(3), are set forth at pp. 1a, 2a, 4a, 5a, and 6a of the petition.

STATEMENT

Pursuant to the authority granted the Secretary of the Department of Health, Education, and Welfare to "promulgate regulations fixing and establishing for any food * * * a reasonable definition and standard of identity * * *" (Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 341) and delegated to the Commissioner of Food and Drugs (21 C.F.R. 2.120), the Commissioner published a proposed definition and standard of identity for peanut butter in the Federal Register in 1959 (24 Fed. Reg. 5391). The proposed standard, among other things, required peanut butter to contain not less than 95 percent peanuts.

Following consideration of written comments received in response to this proposal, a subsequent pro-

posed standard was published permitting an optional ingredient content of not more than 10 percent by weight of the finished food (26 Fed. Reg. 11209). A further revised proposed standard was published in 1964 (29 Fed. Reg. 15173), but the 10 percent maximum for optional ingredients was not altered. Following receipt of additional comments, the definition and standard of identity was finally established on July 8, 1965 (30 Fed. Reg. 8626). Petitioner (who manufactures Peter Pan Peanut Butter) and other interested parties filed objections and a hearing was subsequently held.

Following the hearing, the Commissioner published his findings and tentative order on December 6, 1967 (32 Fed. Reg. 17482). After exceptions to the tentative order were filed and considered, the Commissioner issued his final findings of fact, conclusions, and order on July 24, 1968 (33 Fed. Reg. 10506; Pet. App. 7a-24a).

Among the facts found by the Commissioner to have been established by the evidence of record were that peanut butter in the past has been identified in the public mind as a product composed essentially of peanuts (Finding 2; Pet. App. 10a); that a trend on the part of some manufacturers to lower the peanut content of peanut butter was not always intended for the benefit of the consumer (Finding 2; Pet. App. 10a-11a); that some optional ingredients are used in place of peanuts because they are cheaper than peanuts and their use allows the manufacturer a competitive advantage (Finding 8; Pet. App. 12a); that some manufacturers exceed the 10 percent optional

ingredients standard by using larger amounts of sweetening ingredients lower in sweetening potency than other suitable sweetening ingredients (Findings 15-17; Pet. App. 13a-14a); that other manufacturers use more than 10 percent optional ingredients because of the large amount of stabilizer employed (Finding 18; Pet. App. 14a); that the majority of manufacturers surveyed in 1963 and 1965 produced only peanut butter containing 90 percent or more of peanuts and that others were making part of their production in this range (Finding 12; Pet. App. 13a); and that many manufacturers which have produced or are producing peanut butter containing 87 percent or less of peanuts have in the past produced or are presently producing hundreds of millions of pounds of peanut butter containing 90 percent or more of peanuts (Findings 13-14; Pet. App. 13a).

In the preamble to his findings and order, the Commissioner specifically discussed the "two quite different reasons" advanced by petitioner and by the manufacturer of Skippy peanut butter for an 87 percent peanut requirement (Pet. App. 8a-9a):

> * * * The manufacturer of Skippy brand states that approximately 8½ percent of hydrogenated oil is necessary to make its product acceptable, and the manufacturer of Peter Pan brand states that approximately 9 percent of dextrose is essential for its particular consumer appeal.
>
> The record is clear that the desired emulsification and the properties desired by consumers * * * can be obtained by a 3 percent of hydro-

genated oil or a higher percentage if lightly hydrogenated oil is used.

* * * *

Peter Pan brand peanut butter has gained acceptance in the market. Indeed, the evidence shows that in the opinion of Swift and Co., the parent manufacturing firm, it was better than Skippy brand when it had 5 percent dextrose, 3 percent stabilizer, and 1.7 percent salt. Only by increasing the dextrose an additional 4 percent at the expense of peanuts did the manufacturer of Peter Pan brand "uniquely improve" the product.

In the court of appeals, petitioner argued that the Commissioner's order was not supported by substantial evidence, that the order was arbitrary and unreasonable because it did not embrace its product as formulated, and that the Commissioner erred because he did not set forth in specific findings the reasons why the definition and standard of identity was not extended to include its product formulation. The court upheld the Commissioner's order (Pet. App. 25a-34a).

ARGUMENT

In this Court, petitioner no longer argues that the Commissioner's order is not supported by substantial evidence,[1] but relies on its contention that the Com-

[1] The court held that the 10 percent optional ingredient standard was "supported by substantial evidence and the conclusions rationally follow from the findings." It also recognized that even if there were substantial evidence in support of petitioner's position, the Commissioner's order, being sup-

missioner was obligated to make specific findings as to why petitioner's objections were rejected (Pet. 10). This contention was properly denied by the court of appeals.

There is no legal requirement that administrative findings deal specifically with each rejected contention. As this Court observed in *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 193:

> * * * [A]lthough the Commission[er] made no specific finding upon * * * [petitioner's] contention * * * [he] did consider and discuss it, and * * * the law required no more.

The test to be applied is whether the Commissioner "has * * * explained [his] decision 'with the simplicity and clearness' " necessary to enable the Court to exercise its duty "to say whether it is right or wrong." *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654; *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 331 F.2d 579, 589 (C.A. 1); *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 306 F.2d 739 (C.A. D.C.). The findings of fact to support an administrative order need not be spelled out in "one-two-three" order, but need only be sufficiently clear so that the "path which * * * [is] followed can be discerned."

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ported by substantial evidence, was not thereby rendered arbitrary and unreasonable. Where reasonable alternatives exist, the Commissioner's judgment "is controlling even though the reviewing court might on the same record have arrived at a different conclusion." *Illinois Central R. Co.* v. *Norfolk & W. Ry. Co.*, 385 U.S. 57; *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218, 227-228; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F.2d 676 (C.A. 9), certiorari denied, 338 U.S. 680.

Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U.S. 581, 595; see also *Minneapolis & St. Louis R. Co.* v. *United States*, *supra*, at 192-193; *United States* v. *Pierce Auto Lines*, 327 U.S. 515; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194-197.

The path followed by the Commissioner in this case is easily discerned. The Commissioner duly set forth the significant findings upon which his order was based. While reference to petitioner's objections was not made in those findings, a discussion of those objections was included in the preamble to the order (see *supra*, pp. 4-5). Accordingly, it is clear that petitioner's contentions were adequately considered and rejected by the Commissioner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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